workers v. *Enterprise Corp.*, 363 U.S. 593 (1960), it having been held there that a court may not look to the merits of a dispute that is properly for the arbitrator, and may not refuse to order arbitration because it considers "the *grievance in dispute* as a 'frivolous, patently baseless one'" (363 U.S. a tp. 566) (Emphasis supplied) (Pet. Br. 10). Certainly this doctrine is beyond dispute.

However, petitioner apparently either overlooks or assumes that which this Court has held to be the fundamental prerequisite to the application of this principle, the existence of a "claim which on its face is governed by the contract" (363 U.S. at p. 568). As was stated by Mr. Justice Brennan, with whom Mr. Justice Harlan joined, concurring in the *American Mfg. Co.* and *Warrior & Gulf Navigation Co.* cases:

> "To be sure, since arbitration is a creature of contract, a court must always inquire, when a party seeks to invoke its aid to force a reluctant party to the arbitration table, whether the parties have agreed to arbitrate the particular dispute. In this sense, the question of whether a dispute is 'arbitrable' is inescapably for the court."

Of course, unless there appears upon the face of the contract an obligation to arbitrate the particular matter involved here, the many arbitration decisions cited and discussed by petitioner have no relevance.

The fundamental question then is simply one of whether that which petitioner characterizes as "the grievance in dispute" (Pet. Br. 10) is in fact a dispute which "on its face is governed by the contract" (363

U.S. at p. 568). In this respect, respondents are in full agreement with the statement of petitioner: "If the grievance is one that the parties have agreed to arbitrate, the courts must order arbitration" (Pet. Br. 11). What then is the petitioner's "grievance," and have the parties agreed to arbitrate it, i.e., on its face is the matter governed by the contract? The record readily supplies the answer to the first inquiry: Petitioner's "grievance" is the refusal of respondents to meet and bargain with petitioner as the exclusive representative of those working in the pressroom (Tr. 36-37, 38-39, 10).

The answer to the second inquiry is self-evident: An agreement to arbitrate the subject matter of this "grievance," petitioner's right to continuing recognition as the exclusive representative of respondents' pressroom employees, nowhere appears upon the face of the agreement; petitioner nowhere alleges that it so appears; and, indeed, any such contractual guarantee of continuing recognition independent of petitioner's majority status would clearly violate both the rights guaranteed to employees under the National Labor Relations Act (29 U.S.C. § 157 (1952)) and the procedures which Congress has established for the enforcement of such rights (29 U.S.C. § 159 (1952)). As was said by the court below:

> "Whether the Pressmen represented the employees of the Publishers and whether the Pressmen was the proper bargaining agent for the Publishers to deal with in negotiating a new contract, are questions that the N.L.R.B. can properly determine. In fact, *the parties could not by private agreement take away from the Board the right to make*

those determinations." (Emphasis supplied) (Tr. 84-85).

It was solely in the context of this dispute over petitioner's continuing majority status and in the context of the unanimous and continuing refusal of petitioner's members to report for work that the court below considered the possibility that petitioner's claim involved upon its face any conceivable rights or potential remedies under the contract as to the individual pressmen. In so doing, the court below found that the status of petitioner's members was in dispute only insofar as that status affected the rights of petitioner "to bargain collectively with the publishers as exclusive representative of the pressroom employees of the publishers" (Tr. 84). In fact, as found by the court below, petitioner neither alleges rights which vested in its individual members under the contract (Tr. 87), nor asserts that such members had been injured in any way during the life of the contract (Tr. 83). Of course, under these circumstances it was inevitable that the court below would perceive no rights or remedies as to petitioner's members under the contract, for petitioner's claim on its face presented no such issue. As stated by the court below:

> "There is no claim that during the life of the contract anything occurred which entitled any of the individual members of Pressmen to compensation. They suffered no grievance during the life of the contract that is compensable in any way. Not a single member was willing to or did report for work from the tenth of November, 1959, until after the filing of this action on January 15, 1960. There is no dispute upon this point, for it is readily admitted by the Pressmen. No arbitrator

could award back pay to men who were at all times unwilling to work and who actually did not work.

> "The sole issue that was in dispute between the Pressmen and the Publishers was the technical question of whether the union members who had not worked since November 10th, who had willfully refused to work since that time, who did not intend to work, and who claimed they were not on strike should or should not be technically called employees between December 28 and December 31, 1959." (Tr. 83).

If the status of petitioner's members during the period in question has any relevance whatever it is to a matter entirely outside the scope of the contract, the representative status of petitioner itself. The decision below makes this point quite clear:

> "By the letter of December 27, 1959, the Pressmen state that the only matter with which they are concerned is the right to act as the bargaining agent of the plant workers. The Pressmen raised the question of the status of the employees only after they had received the Publishers' answer. The right that they are seeking to assert is not the right of the individual workers to return to work or to be awarded back pay. They are seeking the right to bargain collectively with the publishers as exclusive representative of the pressroom employees of the publishers." (Tr. 84).

In this regard, petitioner indulges itself in an obvious misconception by attempting to treat as a "grievance which the parties (have) contracted to refer to arbitration" (Pet. Br. 11), a dispute that does not appear, and could not properly have appeared, upon the face of the contract, namely, petitioner's right, if

any, to recognition as the exclusive bargaining representative of respondents' pressroom employees. The court rejected this contention, finding that on its face the claim presented here bears no relation whatever to the contractual obligation to arbitrate. Far from being in conflict with the decisions of this court in *American, Warrior,* and *Enterprise*, such a result is required by the principles there announced.

Petitioner's second argument rests upon the assertion that the decision of the court below is in conflict with decisions of the Third, Fourth, Fifth, and Tenth Circuits in holding, as petitioner puts it, that "the federal courts do not have jurisdiction because the conduct alleged as a breach of contract also constitutes an unfair labor practice within the jurisdiction of the National Labor Relations Board" (Pet. Br. 15). Of course, there would indeed be a split among the Circuits if this were in fact the holding of the court below. However, even a casual reading of that portion of the court's opinion which petitioner cites in support of this assertion readily reveals that such is not the case. Again, petitioner apparently misunderstands the decision below.

In the first place, the essential element involved in each of the four circuit court decisions cited by petitioner (*Lodge No. 12, Machinists* v. *Cameron Iron Works, Inc.*, 257 F.2d 467 (5th Cir. 1958); *Independent Petroleum Workers* v. *Esso Standard Oil Co.*, 235 F.2d 401 (3rd Cir. 1956); *Textile Workers* v. *Arista Mills Co.*, 193 F.2d 529 (4th Cir. 1951); and *United Steelworkers* v. *New Park Mining Co.*, 273 F.2d 352 (10th

Cir. 1959)), is something which obviously is not present here, conduct which on its face involved the contractual rights of the parties. It was this basic element over which the court in each case quite properly exercised jurisdiction. For instance, as stated in that portion of the court's opinion in *Cameron Iron Works*, which petitioner quotes at such length, it is stated:

> " . . . However, the appellee overlooks the obvious distinction between *contract provisions* and *matters committed exclusively to the Board*. If an arbitrable contract violation encompasses an unfair labor practice, the majority of the courts have held that arbitration is proper to decide all matters not included in the pre-emptive area. Likewise, the better-reasoned cases hold that even where the aggrieved incident or act constitutes both a contract violation and an unfair labor practice, particularly concerning a substantive contract right such as employment or pay, the federal district courts will not be deprived of jurisdiction to grant relief as to the breach of contract, the other aspect being left to the Board." (Emphasis the court's.) (257 F.2d at 472.)

As the court in *Cameron Iron Works* also pointed out in the converse situation to that which is presented here,

> " . . . The distinguishing point is that, while an act may be both an arbitrable contract violation *and* an unfair labor practice, a 'breach of contract *is not* an unfair labor practice'; the former is enforced by the courts, the latter by the Board; the former gives to private parties a remedy, the latter uses a private right to effectuate the declared policies of the Act; the former gives a certainty of decision, the latter leaves decision discretionary." (Emphasis the court's.) (257 F.2d at 473.)

(To the same effect are *Independent Petroleum Workers* v. *Esso Standard Oil Co.*, 235 F.2d 401 (3rd Cir. 1956); *United Steelworkers* v. *New Park Mining Co.*, 273 F.2d 352 (10th Cir. 1959); and *Textile Workers* v. *Arista Mills Co.*, 193 F.2d 529 (4th Cir. 1951).)

This vital distinction "between contract provisions and matters committed exclusively to the Board" is one which petitioner evidently is unable to recognize. Instead, petitioner insists upon assuming that the latter, respondents' refusal to bargain, necessarily involves the former, a matter arising under the contract. Of course, it is this element of rights arising under the contract which is patently lacking in this case. As found by the court below, the record in this case readily reveals that the only conceivable right which petitioner and its members seek to protect here is not contractual, but statutory in nature, the right to represent and be represented for purposes of collective bargaining (Tr. 87). No such right appears, or properly could appear, upon the face of the contract (Tr. 84, 88), and questions concerning it necessarily bear absolutely no relation to the interpretation to be placed upon the contract (Tr. 86).

Most assuredly, as held by the court below and by those decisions cited by petitioner, an unfair labor practice may also constitute a breach of contract (Tr. 86). The decision of the court below is in complete accord with this doctrine. In fact, one of the cases (*Textile Workers* v. *Arista Mills Co.*, 193 F.2d 529 (4th Cir., 1951)), cited with approval by the court below as illustrative of this well-established principle, is now pre-

sented by petitioner as evidence of the conflict among the circuits which petitioner claims to exist (Pet. Br. 17). We quote from the decision of the court below:

> "In *Textile Workers' Union* v. *Arista Mills Co.*, 193 F. 2d 529 (4 Cir. 1951), the same court of appeals affirmed the doctrine stated in *Amazon Cotton*, and quoted with approval the following statement made by Chief Judge Jones in *Reed* v. *Fawick Airflex Co.*, 86 F. Supp. 822 (N.D. Ohio 1949):
>
> > "'It is clear that this Court has no jurisdiction to entertain a petition for relief as to unfair labor practices. Whether acts which constitute unfair labor practices under the statute have been committed by an employer and, if so, what remedies will be prescribed for the employees are matters within the exclusive jurisdiction of the Board. . . . *If, however, a particular act is the subject of an agreement between employer and union and the union sues for breach of that contract, the District Court could not be ousted of its jurisdiction to hear and determine the case merely because the act constituted not only a breach of contract but also an unfair labor practice.*' (Emphasis supplied.)
>
> "The facts of the *Reed* case clearly involved the meaning of language that had been used in a contract between the employer and the union and involved substantial rights of the parties. In the case presently under consideration, we have pointed out that no substantial rights of the employees under the contract were involved, and no question is raised concerning the interpretation to be placed on the contract between the parties which expired on December 31, 1959.
>
> * * * *
>
> "We believe that where the question between the parties is whether one or the other has been

> guilty of an unfair labor practice and there are no substantial contract violations involved (and we have found none here) that the exclusive jurisdiction for the settlement of such a dispute should rest with the N.L.R.B." (Tr. 86-87.)

Certainly, the foregoing can leave no doubt either as to the position of the court below or as to its full agreement with the decisions of the Third, Fourth, Fifth and Tenth Circuits on this particular point. Petitioner's assertions to the contrary are clearly not well founded.

The peculiar facts of this case neither involve legal questions about which there is any real doubt nor present issues of "substantial public importance" (Pet. Br. 18). To be sure, the publishers' December 28, 1959, refusal to bargain with petitioner is of substantial importance to petitioner, as indeed it is to the respondents. However, contrary to petitioner's apparent assumption, this fact neither raises a breach of contract nor presents a grievance which on its face the parties have agreed to arbitrate. On the contrary, the situation here presents statutory procedures and potential statutory remedies with which petitioner is no doubt thoroughly familiar.

This case presents no question of screening grievances for merit or for substantial remedy (Pet. Br. 18). Nor does this case involve the abdication of jurisdiction over contract violations which may also present issues cognizable by the National Labor Relations Board (Pet. Br. 18). Instead, as is apparent, this case presents a dispute over a refusal to bargain. The question of whether it was a proper refusal under the circumstances is not here involved. What is involved is the obvious fact

that the refusal to bargain does not present a grievance which on its face is governed by the contract between the parties and which the parties have agreed to arbitrate. The courts below so held.

CONCLUSION

For the reasons stated above, respondents respectfully submit that this Court should decline to issue its writ of certiorari to review the decision below.

Respectfully submitted.

MANLEY B. STRAYER,
GARRY R. BULLARD,
HART, ROCKWOOD, DAVIES,
BIGGS AND STRAYER,
1410 Yeon Building,
Portland 4, Oregon,
Attorneys for Respondent
Journal Publishing Company.

WILLIAM F. LUBERSKY,
LEWIS K. SCOTT,
KOERNER, YOUNG, MCCOLLOCH,
& DEZENDORF,
800 Pacific Building,
Portland 4, Oregon,

BLACK, KENDALL & TREMAINE,
1200 Cascade Building,
Portland 4, Oregon,
Attorneys for Respondent
Oregonian Publishing Company.

APPENDIX A

"Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, * * *."

(49 Stat. 452 (1935), as amended, 29 U.S.C. § 157 (1952))

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"Sec. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment * * *."

(49 Stat. 453 (1935), as amended, 29 U.S.C. § 159(a) (1952))

- - - - - - -

"Sec. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in Section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *."

(49 Stat. 453 (1935), as amended, 29 U.S.C. § 160(a) (1952))

- - - - - - -

"Sec. 8. (d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment * * *. Provided, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce,

the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

* * *

"(4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

* * * Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer."

(61 Stat. 140 (1947), 29 U.S.C. § 158(d) (1952))

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 827

PORTLAND WEB PRESSMEN'S UNION, LOCAL NO. 17,
Petitioner,

v.

OREGONIAN PUBLISHING COMPANY and JOURNAL PUBLISHING COMPANY, *Respondents.*

REPLY BRIEF OF PETITIONER IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

CLIFFORD D. O'BRIEN
Cascade Building
Portland 4, Oregon

RICHARD R. CARNEY
725 Pacific Building
Portland 4, Oregon

RUTH WEYAND
1346 Connecticut Ave., N. W.
Washington 6, D. C.

Counsel for Petitioner

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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The insistence throughout the Brief in Opposition (pp. 2, 4, 6, 9, 10, 11-12, 14) that this case "involves only a dispute concerning petitioner's continuing status as the exclusive bargaining representative of the pressroom employees of respondents" (Br. in Opp. p. 2), is contrary to the view of both of the courts below and to the undisputed record.

The court below stated (Pet., p. 28b):

> "The sole issue that was in dispute between the Pressman and the Publishers was the technical question of whether the union members who had not worked since November 10th, who had willfully refused to work since that time, who did not intend to work, and who claimed they were not on

strike should or should not be technically called employees between December 28 and December 31, 1959."

The district court likewise described the "grievance of plaintiff concerning the employer's position that the employee status of Plaintiff's members was terminated" as the "only" dispute involved in this case (Tr. 65). The district court further stated that this was the grievance asserted by the Pressmen in the letter of December 28, 1959 (Tr. 65).

There is nothing in the record to warrant any conclusion that the Pressmen's grievance was directed either primarily or in any part at securing an arbitration award requiring the Publishers to bargain with the Pressmen. While it could be that relief the arbitrator might award would involve, either directly or indirectly, as a part of the remedy, an order to the Publishers to deal with the Pressmen, the possibility of such an award does not strip the grievance of its basic issues and make a demand for bargaining the grievance itself. Rather, the Pressmen's grievance arose solely out of the Publishers' letter of December 28, 1959 (Tr. 38) in which the Publishers took the position that the Pressmen had violated the no-strike clause of the then existing collective bargaining agreement and that its members were no longer employees. The Pressmen desired to have an arbitrator pass on the issues of whether the Pressmen had violated the no-strike clause and whether its members had been properly discharged for honoring the Stereotypers' picket line (Tr. 40).

If the Pressmen had not at once invoked arbitration of these issues, its failure might have had many repercussions unconnected with resumption of bargaining

relations between the Pressmen and the Publishers. The Publishers may still sue the Pressmen in court for damages for violation of the no-strike clause. In at least one such court suit, unions in their efforts to stay judicial proceedings pending arbitration, have faced the contention that they waived arbitration by failing to invoke it.[1] Similarly, the duty of the Pressmen to invoke arbitration to protect the job rights of its members exists wholly apart from the Pressmen's status as bargaining representative.

To assert, as respondents do (Br. in Opp., pp. 3, 6, 14) that the grievance which Pressmen attempted to submit to arbitration was the refusal to bargain, constitutes a complete distortion of the record. It is true that the complaint here sets forth the context of efforts to negotiate a new contract during the course of which the Pressmen discovered that the Publishers had decided to treat the Pressmen's members as no longer employed by the Publishers. The contract between Pressmen and the Publishers had been opened for renegotiation before the Stereotypers strike began (Tr. 6). One meeting to discuss the terms of a new contract between the Pressmen and the Publishers took place on November 18, 1959 (Tr. 7). At that time the Publishers met with the Pressmen and proceeded with the negotiation of a new contract (Tr. 7-8). When the Pressmen sent its letter of December 27, 1959, seeking further meetings to negotiate a new contract (Tr. 36-37), the Pressmen was unaware that the Publishers were contending that the Pressmen had violated the collective bargaining agreement or that its members

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[1] *Tenney Engineering, Inc.* v. *United Electrical Radio and Machine Workers of America* (D.C.N.J. 1959), 174 F. Supp. 878, appeal dismissed, 2 Cir., 1959, 267 F. 2d 618.

were no longer employees. Although the Stereotypers' strike had begun on November 10, 1959, and the members of the Pressmen acting individually had, from that date on, continuously refused to cross the Stereotypers' picket line, the Publishers had met with the Pressmen on November 18, 1959 and proceeded with the negotiation of a new contract between the Publishers and the Pressmen without raising any contention that the Pressmen's members had ceased to be employees, or were in serious or any violation of the contract.

With this background, the Publishers' letter of December 28, 1959 (Tr. 38-39), came as a complete surprise. It injected into the relationships between the parties new issues—had the Pressmen by its conduct violated the no-strike clause and had the members of the Pressmen by their conduct forfeited employee status. It was these issues which the Pressmen by its letter of December 28, 1959 (Tr. 40-41) referred to arbitration.

After having referred these issues to arbitration, where they clearly belonged, the Pressmen quite properly omitted any reference to these issues when on January 2, 1960, the first business day after its old contract expired, it called a strike against the Publishers to secure a new contract (Tr. 10). While respondents (Br. in Opp., pp. 5-6) contend that the failure to mention the reinstatement of its members in its strike call showed that the Pressmen's real objective in the arbitration was to get its bargaining rights restored rather than to restore the jobs of its members, we submit the respondents both improperly read the record and improperly make the nature of the grievance turn on some supposed motive of the Pressmen rather than on the language of the grievance submitted.

The omission of the issues separated out for arbitration from the objectives of the strike established just the opposite of what the respondents argue. The grievance was directed at clearing up the issue of whether the Pressmen had been guilty of a contract violation and whether its members had been properly discharged. The strike was about something different—whether the Publishers should bargain with the Pressment and the terms of the new contract. The Union could not consistently insist on arbitrating issues and at the same time strike over those same issues. The stated objectives of the strike show the arbitration case was about issues other than and sharply different from, the right to bargain and get a new contract.

The fact that the Pressmen will in all probability get its bargaining rights restored if it is successful in securing reinstatement of its members, cannot make the grievance about the employment rights of its members anything other than a legitimate breach of contract grievance.

We accordingly respectfully submit that the decision below does present the questions stated in our petition for a writ of certiorari (p. 2) and that this Court should grant the writ.

CLIFFORD D. O'BRIEN
Cascade Building
Portland 4, Oregon

RICHARD R. CARNEY
725 Pacific Building
Portland 4, Oregon

RUTH WEYAND
1346 Connecticut Ave., N. W.
Washington 6, D. C.

Counsel for Petitioner

April 25, 1961